
REDEGØRELSE

DONG ENERGY A/S

Resumé

Norbom Vinding

SUMMARY OF THE REPORT OF THE INQUIRY INTO CERTAIN ARRANGEMENTS MADE BY MR ELDRUP IN DONG ENERGY

SUMMARY

The finding of the inquiry carried out by Norrbom Vinding into certain arrangements made by Mr Anders Eldrup in Dong Energy is that, in Norrbom Vinding's opinion, Mr Eldrup has disregarded the duties incumbent on him as the CEO and to such an extent as to be characterised as disloyal. Another way to put it is that Mr Eldrup ought to know that he should have acted differently and that, by not doing so, he has put himself in a position where a unanimous board of directors has rightly lost the confidence in Mr Eldrup which is a fundamental necessity for a board of directors to have in a CEO. In consequence of this, Mr Eldrup's conduct must be characterised as breach.

In relation to Mr Eldrup's service agreement, the consequence of this finding is that, on termination, Mr Eldrup is only entitled to his contractual notice of 12 months.

Mr Eldrup is only entitled to the severance payments provided for in his service agreement if the service agreement is terminated other than for breach. Thus, in Norrbom Vinding's opinion, in the present situation Mr Eldrup is not entitled to those severance payments.

This conclusion is based on the following:

1.0 Assignment

- 1.1 At the board meeting held on 9 March 2012 in DONG Energy, the board of directors resolved to request Norrbom Vinding's opinion as to whether, in connection with establishing terms of pay and employment for four identified current and former employees, Mr Eldrup as the CEO of DONG Energy has acted in such a way as to be deemed to be in breach of his duties as a CEO.
- 1.2 The background for this request from the board of directors was that the chairman of the board, Fritz Schur, had been tipped off by a whistleblower that the terms of pay and employment of certain identified employees appeared to be unusual.

2.0 Terms of reference

- 2.1 The terms of reference for the inquiry were as follows:

1. Clarification of the terms of pay and employment of a number of identified employees

In connection with clarifying the terms of employment, the extent to which the terms of pay and employment may be deemed to be unusual should be identified, having regard to the principles for setting terms of pay and employment which generally apply in DONG Energy.

2. Clarification of Mr Eldrup's role in connection with creating the terms of pay and employment of the employees in question

Here, the extent to which the HR department, the Remuneration Committee of DONG Energy and the board of directors have been involved in setting the terms of pay and employment of the employees in question should also be identified.

To the extent that there has been no such involvement, the extent to which such involvement should have taken place should be identified, having regard to the usual policies and procedures in this respect in DONG Energy.

3. Clarification of the consequences of any breach for the terms on which Mr Eldrup's employment may be terminated

If the inquiry finds that Mr Eldrup is in breach of his duties as the CEO of DONG Energy, the consequences of such breach should be assessed in relation to the terms on which Mr Eldrup's employment can be terminated.

4. Clarification of the consequences of any breach with regard to liability for damages

In this connection, it should further be assessed whether the arrangements made by Mr Eldrup may give rise to liability on his part.

5. Clarification of whether the terms (of employment) of the other members of DONG Energy's group management give rise to comments of a legal nature

- 2.2 It should be noted that the inquiry was initiated at the instance of the board of directors of DONG Energy. The terms of reference for the inquiry reflect what the board of directors asked Norrbom Vinding to clarify and assess. The framework of the terms of reference has thus been set without regard to any other issues that may be discovered in connection with other inquiries, such as the Auditor-General's inquiry initiated by the Public Accounts Committee. For the avoidance of doubt, it is emphasised that Norrbom Vinding has carried out the inquiry in its capacity as DONG Energy's legal adviser.

3.0 Basis of the inquiry

- 3.1 The inquiry has been carried out primarily on the basis of written materials. The materials were made available by DONG Energy. In addition, Norrbom Vinding has requested further materials from DONG Energy to the extent that this was deemed relevant. Generally, Norrbom Vinding received all materials requested.
- 3.2 Also, three face-to-face interviews and a number of telephone interviews were conducted in connection with the inquiry. In addition to three employees, all members of the board of directors, except for the employee representatives, were interviewed (over the telephone).
- 3.3 Except for one interview with two employees from the HR department, the interviews were conducted individually with the respective interviewees and without the interviewees having been presented, whether during or before the interview, with the information given by the other interviewees. After each

interview, Norrbom Vinding wrote minutes of the interviews and forwarded them to the interviewees in question for their confirmation and any comments.

- 3.4 In order to ensure the factual validity of the inquiry and to ensure the rights of defence, Mr Eldrup has been provided with an opportunity to forward his comments and has therefore been provided with a draft of the paragraphs describing the facts.

4.0 Findings

- 4.1 The inquiry conducted shows that several identified employees have obtained terms of pay and employment which go beyond what the general remuneration policies of DONG Energy would warrant. The terms of pay and employment in question have been granted by Mr Eldrup.

- 4.2 With regard to the remuneration level of the employees in question, it is found that although their base salary does not seem remarkable when compared with the average base salary of employees at the organisational level in question which was known by the board of directors, the employees have obtained grants of variable pay elements to an extent which go far beyond the general remuneration policies of DONG Energy and, similarly, bonus instruments have been used which do not even exist in the bonus programmes which have been adopted by and apply in DONG Energy.

- 4.3 In the inquiry, the question of whether the remuneration of the employees in question corresponds to the market level or their qualifications has not been assessed by Norrbom Vinding. It has simply been established that the composition of the relevant employees' remuneration has differed considerably from the general practice in DONG Energy under the policies adopted by the board of directors – and the Remuneration Committee, respectively.

- 4.4 Thus, it has been established that in some years the variable pay elements received by a number of employees exceeded what the employees in question received in base salary, excluding pension and benefits.

For example, for the years 2009 and 2011, the variable pay elements that were paid out to the employees in question exceeded their base salary (pension and benefits excluded). For 2010, the variable pay elements that were paid out to a number of the employees in question corresponded to more than 90 per cent of their base salary (pension and benefits excluded).

- 4.5 This should be seen together with the fact that under the general remuneration policies of DONG Energy, performance rewards are generally only permitted to constitute an amount equivalent to 25 per cent of the base salary (30 per cent of the base salary with effect from 1 January 2011).

- 4.6 The employees in question have thus obtained a composition of their remuneration which goes beyond those policies and, similarly, the composition of their remuneration goes beyond the balance between fixed and variable pay elements that must be struck for the executive management (the CEO and the group CFO).

- 4.7 Generally in DONG Energy, employees negotiate their pay individually with their immediate manager, who will then have the result of the negotiations approved by his or her immediate manager. This fundamental principle is known as the “grandfather principle”.
- 4.8 It has been established that Mr Eldrup’s involvement in the negotiation of the base salary as well as the grant of variable pay elements to the employees in question has not followed this fundamental principle since Mr Eldrup has conducted pay negotiations with employees to whom he was the “grandfather” and also has accepted that one of the employees who reported directly to him negotiated pay via an employee who was at a lower organisational level than that employee.
- 4.9 In addition, Mr Eldrup has accepted that, for a number of years, four employees have negotiated their pay collectively directly with him and that the pay negotiations have been conducted under the pressure caused by Mr Eldrup’s fear that if the four employees did not achieve what they wanted, there was a risk that they would leave DONG Energy together, which was felt by Mr Eldrup to be a serious and realistic risk.
- 4.10 Additionally, although pay is generally negotiated once every year in DONG Energy, it has been established that for the four employees base salary negotiations have typically been conducted every other year. On the other hand, so many regular promises have been given and so many discussions about grants of variable pay elements have been conducted that pay negotiations have in effect been conducted continuously.
- 4.11 The board of directors has been aware of neither:
- the actual level of remuneration of the employees in question;
 - the base salary to variable pay elements ratio of the remuneration received by the employees in question;
 - the extent to which variable pay-outs were obtained which departed from the general remuneration policies of DONG Energy; nor
 - the process that was followed in connection with the base salary and variable pay elements obtained by the employees in question.
- 4.12 Mr Eldrup has stated his view that the remuneration of the employees in question should not have been submitted to the board of directors. In this connection, Mr Eldrup pointed out that he had a framework which meant that investments of up to DKK 100 million did not have to be submitted to the board of directors. However, nowhere is it stated that those investment frameworks concern terms of pay and employment.
- 4.13 On the contrary, it has been established that, in 2005 before DONG Energy’s merger with Elsam, Mr Eldrup submitted to the board of directors a question about retention bonuses and a special severance payment to a number of identified key employees whom it was considered important to retain until the merger had been effected. The additional costs in this connection were stated to total around DKK 10 million.

- 4.14 A few months later, four of the employees whose terms have been the subject of this inquiry obtained a promise of a one-off bonus, an annual additional payment referred to as a one-off payment – notwithstanding that it was assumed to be a recurring annual payment – and a special bonus of up to 30 per cent of the annual pay. This arrangement seems to have been the start of the continuous negotiations that the employees in question have had with Mr Eldrup. The arrangement from May 2005 with the employees in question does not seem to have been submitted to the board of directors, in the same way as Mr Eldrup's other arrangements with those employees have not been submitted to the board of directors, either.
- 4.15 In addition, it has been established that Mr Eldrup promised a total of five centrally placed employees up to a total of 12 months' paid leave for each of them. The promises of leave were given in the period from January 2009 – February 2012.
- 4.16 However, none of the promised periods of leave have been taken by the employees. On the contrary, some of the periods of leave have been converted into salary payments. One employee, for example, converted 6 months' leave into a salary payment which amounted to more than DKK 2.5 million including the derivative effects on performance rewards, bonus and holiday pay.
- 4.17 Based on the inquiry conducted, it is still unclear whether Mr Eldrup and the employees in question actually imagined that it would be possible for them to take the leave as agreed. Considering the fact that the employees in question were regarded as key employees, however, it does not seem very likely that it was realistic that DONG Energy could do without them for such a long period of leave as they had been promised. It is therefore difficult to see any reason for the leave arrangements other than that they meant in effect that the employees in question were given an additional variable pay element which was not available under the general remuneration policies of DONG Energy. The board of directors was not informed of the grant of paid leave, either.

5.0 Relations with the board of directors and the Remuneration Committee of the board of directors

- 5.1 In Norrbom Vinding's opinion, it would have been obvious in at least five situations for Mr Eldrup to have initiated a discussion with the Remuneration Committee of the board of directors or at least with the chairman of the board of directors. But no such discussion was initiated. At the same time, it has been established that the contractual basis underlying the grants of variable pay elements is not found in the contracts of employment, but in addenda or letters of confirmation. As a result, the grants of variable pay elements did not become immediately visible.
- 5.2 Also, Mr Eldrup promised one employee that during the first six months of 2013 he will be able to leave DONG Energy at his own initiative on unusually favourable terms. It would seem obvious for Mr Eldrup to make sure that the board of directors – or at least the chairman of the board of directors – was informed of this contract term. Similarly, it would have been obvious for Mr Eldrup to make sure that the board of directors – or at least the chairman of the board of directors – was informed that the same employee will be entitled to consider his contract of employment terminated by DONG Energy on unusually favourable terms if Mr Eldrup leaves DONG Energy.

5.3 Mr Eldrup and the four employees wanted to introduce additional special terms in June 2010. HR felt it was increasingly difficult to make their reservations heard, which led HR to forward a clear memo to Mr Eldrup in June 2010, warning against accommodating the wishes of the employees in question.

5.4 Among other things, the memo from HR contains the following wording in relation to the wording of a non-compete clause:

The above are terms that depart quite significantly from what we usually see in the market ...

5.5 The memo also says:

For a partially state-owned company like DONG Energy, this is an unusually large severance payment ...

5.6 The memo then points out:

This means that [name] will be the best remunerated employee of DONG Energy.

5.7 In relation to an option for the employee in question to consider his contract of employment terminated and be released from the duty to work, the memo notes:

Please note that this is a very special arrangement which is very rarely seen in the market.

5.8 Finally, the memo emphasises that the remuneration received by all of the employees in question was at the same level as that of DONG Energy's group executive management and that Mr Eldrup was encouraged to consider notifying the Remuneration Committee in accordance with the remit of the Committee.

5.9 In Norrbom Vinding's opinion, Mr Eldrup should have submitted the terms of the employees in question to the Remuneration Committee at least at this point in time. He did not, however.

5.10 At the same time, Norrbom Vinding has established in the inquiry that on two occasions in memos to the Remuneration Committee of the board of directors and to the chairman of the board of directors, respectively, Mr Eldrup removed a paragraph from the draft provided to him. The paragraph described in general terms that the remuneration received by certain specialists was extraordinarily high. Instead he inserted a reference to the general performance reward system without any mention of the existing special arrangements. If the wording in question had not been removed, it would have given the board of directors or the Remuneration Committee a basis for asking questions about the arrangements.

6.0 Assessment

6.1 Norrbom Vinding's assessment of this process is that over the years – and probably starting back when the employees in question were promised an annual “one-off payment” in 2005 – Mr Eldrup has increasingly put himself in a position where the employees in question were in effect able to dictate their own terms.

6.2 At the same time, it cannot be ruled out that at some point in the process, Mr Eldrup may have realised that he, too, found himself in a position where it would be difficult for him to involve the board

of directors, considering the arrangements he had already made in relation to the employees in question.

- 6.3 At least at some point in the process the situation developed to such a point that Mr Eldrup should have submitted the terms of employment approved by Mr Eldrup for special employees to the board of directors, in accordance with section 115 of the Danish Companies Act.
- 6.4 Summing up, Norrbom Vinding is of the opinion that the arrangements made by Mr Eldrup in connection with the matters that are the subject of this inquiry mean that, through his own actions, Mr Eldrup has put himself in a position where the board of directors has rightly lost the confidence in him which is vitally important for a board of directors to have to a CEO.
- In this context, particular weight has been given by us to the fact that this is a case of what must be characterised as either circumvention of or outright disregard for the remuneration policies of DONG Energy.
 - Weight has been given by us to the fact that DONG Energy has a Remuneration Committee which has been deprived of the opportunity to consider the peculiar remuneration practices with regard to employees in a specific department.
 - Weight has been given by us to the fact that on several occasions – particularly HR's letter from June 2010 – Mr Eldrup received what must be characterised as direct requests to involve the Remuneration Committee and/or the board of directors, and that he nonetheless still did not inform them of the peculiar terms of pay and employment.
 - Weight has been given by us to the fact that the inquiry has shown that the board of directors has unanimously disapproved of the terms given to the employees in question and that the board of directors has unanimously indicated that it would never have accepted such terms.
 - In this context, weight has also been given to the fact that DONG Energy is a company in which the Danish Government is the principal shareholder and that this generally means that particular diligence and care is required in relation to remuneration practices and terms of employment.
- 6.5 In light of our conclusions and particularly in light of the fact that Mr Eldrup has had several opportunities to involve the Remuneration Committee and the board of directors, we find that Mr Eldrup has disregarded the duties incumbent on him as the CEO and to such an extent as to be characterised as disloyal. Another way to put it would be to say that Mr Eldrup ought to know that he should have acted differently and that, by not doing so, he has put himself in a position which must be characterised as breach.
- 6.6 However, whether this can also be deemed to constitute gross breach with the consequence that the company is entitled to release itself with immediate effect from its obligations under Mr Eldrup's service agreement is more difficult to say with the same degree of certainty.
- 6.7 In Norrbom Vinding's opinion, unconditional trust between a CEO and a board of directors is a necessary and quite fundamental prerequisite for a board of directors to leave the day-to-day management to the CEO. A board of directors only has limited possibilities of supervising the actions

of a CEO on a daily basis, to which must be added that thorough supervision of the daily arrangements and transactions made by a CEO in the course of the day-to-day management of the company lies beyond the remit of a board of directors.

- 6.8 The main task of the board of directors is the general and strategic management of the company. It is therefore all the more important that the trust between a CEO and the board of directors is not breached and if the CEO's conduct is the direct reason for the breach of trust, the CEO is clearly in breach of his duties in Norrbom Vinding's opinion.
- 6.9 It must be recognised, however, that during his time as the CEO of DONG Energy, Mr Eldrup has played a central part in the substantial developments that have taken place in the company on Mr Eldrup's watch. At the same time, there is nothing in the materials which indicates that Mr Eldrup has gained financially from the arrangements made by him. This is supported by the fact that Mr Eldrup stated in his comments that the arrangements were made by him solely in the interests of DONG Energy.
- 6.10 Although the arrangements which have been made by Mr Eldrup and which have been the subject of this inquiry thus, in Norrbom Vinding's opinion, constitute a clear breach on his part, the most natural result of the above more general considerations would be not to characterise the arrangements as a gross breach.
- 6.11 If the above is seen together with Mr Eldrup's service agreement, the consequence is that, on termination, Mr Eldrup is entitled to his contractual notice of 12 months. Under the service agreement, Mr Eldrup is further entitled to two severance payments amounting to 12 and 9½ months' pay, respectively, a total of 21½ months' pay. However, Mr Eldrup is only entitled to those severance payments if his service agreement is terminated by DONG Energy other than for breach. Accordingly, in Norrbom Vinding's opinion, Mr Eldrup is not entitled to either of those severance payments in the present situation.
- 6.12 In Norrbom Vinding's opinion, there is no basis for claiming damages from Mr Eldrup.

Copenhagen, 26 March 2012

[signed]
Mariann Norrbom

[signed]
Christian K. Clasen

[signed]
Elsebeth Aaes-Jørgensen

